IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

SOFTVIEW LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 10-389-LPS
	:	
APPLE INC., and AT&T MOBILITY LLC,	:	
	:	
Defendants.	:	

MEMORANDUM ORDER

At Wilmington this **30th** day of **September 2011**:

IT IS HEREBY ORDERED that:

1. Pending before the Court is Plaintiff Softview LLC's ("Softview") Motion for Leave to Amend its Complaint to Assert Claims Against Additional Infringers. (D.I. 61) ("Motion to Amend") By its Motion to Amend, Softview seeks to add to this case allegations of infringement of the same patents-in-suit against additional defendants. Having reviewed the parties' filings, the Motion to Amend is **GRANTED**. Softview's Motion to Amend is timely under the Scheduling Order (D.I. 57 ¶ 2), the requirements for permissive joinder are satisfied, *see* Fed. R. Civ. Proc. 20 & 21, and the proposed addition of additional defendants will promote judicial economy. Defendants' opposition largely consists of concern about jury confusion as between Defendants' products (i.e., Apple devices using Apple's proprietary Safari web browser) and the products of the additional defendants which Softview is adding to the case (i.e., devices using the open-source Android platform developed by Google). Under the circumstances, it would be premature for the Court to decide the issue of separate trials at this time. *See* Fed. R.

Civ. Proc. 20(b), 42(b). Any party is free to present a request for separate trials at any time up to the date of the final pre-trial conference. The concerns raised by Defendants do not present sufficient reason to deny Softview leave to amend its complaint as requested.

2. Also pending before the Court is Softview's Motion to Dismiss and Strike Defendant Apple Inc.'s and Defendant AT&T Mobility LLC's Inequitable Conduct Defenses. (D.I. 37) ("Motion to Strike") Defendants oppose the Motion to Strike and request that it be denied; in the alternative, Defendants request leave to amend their pleadings, contending that their proposed amendment eliminates any purported deficiency identified by Softview. (D.I. 45 at 1-2, 11-13 & Ex. A) Having reviewed the parties' filings, the Motion to Strike is **GRANTED**. Defendants' original and proposed amended pleadings fail to adequately allege scienter. *See Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1330 (Fed. Cir. 2009) (stating inequitable conduct pleading must allege facts "giv[ing] rise to a reasonable inference of scienter, including both (1) knowledge of the withheld material information or of the falsity of the material misrepresentation, and (2) specific intent to deceive the PTO"). Defendants' theory is based on a mere disagreement with Softview's prosecution counsel as to whether certain amendments impermissibly added "new matter" as well as the relative timing of those amendments and Defendants' introduction of the accused Apple iPhone. (D.I. 45 at 1, 4-6) This disagreement does not give rise to a reasonable inference that prosecution counsel *knew* he was amending to add new matter and *intended to deceive* the PTO of this fact. *See generally Astrazeneca Pharm. LP v. Teva Pharm. USA, Inc.*, 583 F.3d 766, 770 (Fed. Cir. 2009) ("Intent to deceive cannot be inferred from a high degree of materiality alone, but must be separately proved to establish unenforceability due to inequitable conduct."). Accordingly, the proposed

amendment is futile, as it fails to state an affirmative defense for invalidity of the patents-in-suit due to inequitable conduct on which relief could be granted.

Delaware counsel are reminded of their obligations to inform out-of-state counsel of this Order. To avoid the imposition of sanctions, counsel shall advise the Court immediately of any problems regarding compliance with this Order.

UNITED STATES DISTRICT JUDGE